

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

In re POLYURETHANE FOAM  
ANTITRUST LITIGATION

MDL Docket No. 2196

Index No. 10 MD 2196 (JZ)

ORDER

JUDGE JACK ZOUHARY

This Court held a record hearing on October 24, 2012 (2.25 hours) (Court Reporter: Tracy Spore). Attached to this Order is a list of counsel in attendance, both in person and via phone, and the Agenda.

**1. Discovery Dispute - Foam Ex Innovations (October 11, 2012 Letter)**

Counsel informed this Court that the issue regarding the Foam Ex Canada documents is now moot because Foam Ex Innovations has agreed to make certain documents available by the **end of November**.

With regard to the search terms dispute, this Court advised counsel that it does not believe Plaintiffs are restricted to the searches Foam Ex Innovations conducted in connection with its production to the U.S. Department of Justice, and encouraged counsel to continue discussions with that in mind. This Court further advised that Foam Ex should bear the costs associated with discovery of the identified custodians, but counsel may revisit the issue of cost-shifting if Plaintiffs later seek additional discovery which Defendants believe is onerous. This Court also encouraged counsel to continue discussions about the ability to conduct custodian-based searches of the shared drive and the scope of documents retrieved for shared folders.

**2. Motion to Compel - Costco Wholesale Corp. (Docs. 428-30)**

Marvin Miller represents that discussions with Costco are ongoing regarding document production; therefore this Court denies, without prejudice, the Motion to Compel as moot, which Plaintiff Indirect Purchasers may reopen, if needed, by calling Chambers.

**3. Motion to Compel - Empire Today, LLC (Doc. 431)**

Marvin Miller represents that discussions with Empire are ongoing regarding document production; therefore this Court denies, without prejudice, the Motion to Compel as moot, which Plaintiff Indirect Purchasers may reopen, if needed, by calling Chambers.

**4. Clarification of August 30, 2012 and September 7, 2012 Orders**

With regard to the August 30, 2012 Order, this Court and counsel discussed the timing of expert report deadlines. This Court indicated counsel may submit alternative deadline proposals with the understanding that trial, as all agreed, is firmly set for **October 2014**.

With regard to the September 7, 2012 Order, counsel indicated that some confusion exists about the extent of discovery permitted for “fabricated foam products.” This Court orders counsel to submit simultaneous briefs regarding the issue by no later than **November 15, 2012**. The briefs are not to exceed **fifteen (15) pages** and are to address the overlap or potential overlap of products produced by Plaintiffs and Defendants, and the effect of such overlap in connection with the discovery Defendants seek.

**5. Glossary of Terms**

This Court previously suggested counsel submit an agreed-upon glossary of key phrases that can be used by counsel in future briefing so that such phrases will be both understood and applied consistently. Counsel informed this Court they have only recently begun such talks and/or are having

difficulties reaching agreement on definitions. This Court is looking for a jointly agreed upon Glossary, if counsel can agree, by **November 15, 2012**.

**6. Schedule for Vitafoam Settlement (Doc. 432)**

This Court and counsel discussed the import and application of the recent Order (Doc. 432) issued by Magistrate Judge Knepp denying Plaintiffs' Motion for Approval of a Proposed Program for Transmitting Notice of the Vitafoam Settlement and Domfoam Settlement to Members of the Proposed Settlement Classes (Doc. 374). In light of concerns raised, this Court requests counsel submit additional briefing addressing whether the Order should be reconsidered or altered. Specifically, counsel shall focus on case law addressing the approval of a class-action settlement in a multi-defendant case like ours, post- *Wal-Mart Stores, Inc. v. Dukes*, —U.S.—, 131 S. Ct. 2541 (2011). These additional briefs are to be filed no later than **November 2, 2012** and are not to exceed **ten (10) pages**.

**7. Scheduling of Depositions – ECF Notices**

Finally, as discussed at the hearing, this Court orders counsel to electronically file Notices of Depositions with this Court and to include a brief description of the title or position of the deponent.

IT IS SO ORDERED.

s/ Jack Zouhary  
JACK ZOUHARY  
U. S. DISTRICT JUDGE

October 25, 2012